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No. 83-1019

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BARBARA J. WIED,

Petitioner,

v.

VALHI, INC.,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Delaware

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BRIEF OF RESPONDENT VALHI, INC. IN OPPOSITION

FRED H. BARTLIT, JR.
JEFFREY S. DAVIDSON *
NANCY E. HOLLINGSWORTH
KIRKLAND & ELLIS
1776 K Street, N.W.
Washington, D.C. 20006
(202) 857-5000

A. GILCHRIST SPARKS, III
MORRIS, NICHOLS, ARSHT & TUNNEL
12th and Market Streets
Post Office Box 1347
Wilmington, DE 19899
(302) 658-9200

Attorneys for Respondent Valhi, Inc.

* Counsel of Record

Date: January 19, 1984

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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SUMMARY OF ARGUMENT

The "Due Process" claim raised in the Petition for Writ of Certiorari is procedurally and substantively defective. Procedurally, the claim was not raised until a motion for rehearing before the Delaware Supreme Court and, therefore, was not presented to the state courts in a proper and timely manner which would give this Court jurisdiction.

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* Valhi, Inc. has been merged into Contran Corporation which is 98.9% owned by a trust formed by Harold C. Simmons in 1964 for the benefit of his children and grandchildren. LLC Corporation and The Amalgamated Sugar Company are affiliates of Contran. National City Lines, Inc. is a subsidiary of Contran. T.I.M.E.-DC, Inc. is a subsidiary of National City Lines. Keystone Consolidated Industries, Inc. is an affiliate of National City Lines.

Substantively, there is no factual basis for petitioner's Due Process claim, and no Due Process questions are presented on this record. All PSA, Inc. stockholders were given full, court-approved notice and an opportunity to be heard on the redemption agreement at issue in this case, as well as on petitioner's claim below that respondent Valhi, Inc. allegedly failed to comply with Delaware Court of Chancery Rules 23 and 23.1. On the basis of the trial record which was developed, the Delaware courts concluded as a factual matter that (1) PSA stockholders were never prejudiced in any way by any conduct of Valhi; (2) the redemption was fair to PSA and its stockholders in every respect; and (3) Valhi received no profit in the redemption. The Petition does not challenge these adjudicated factual findings. Rather, it assumes a different version of the facts in order to construct legal issues which do not exist on this record.

ARGUMENT

1. Petitioner Failed to Timely And Properly Raise Her "Due Process" Claim in the Courts Below.

Petitioner has invoked 28 U.S.C. § 1257(3) as the jurisdictional basis for her requested writ of certiorari.[1] This asserted jurisdictional basis for review exists only if the record shows expressly or by clear implication that petitioner's "federal claim" was adequately presented in the Delaware state court system. *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928); *Webb* v. *Webb*, 451 U.S. 493, 496-97 (1981). The petitioner must demonstrate that her federal claim "was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari." Sup. Ct. R. 21.1(h).

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[1] Petition for a Writ of Certiorari to the Supreme Court of Delaware (hereinafter "Pet.") at 2. The Appendix to that Petition is hereinafter cited as "A. ——."

Petitioner cannot make the required showing. Petitioner raised no federal question before the trial court or on argument to the Delaware Supreme Court. Instead, Petitioner's claim in the Delaware courts was that Valhi allegedly failed to comply with Delaware Court of Chancery Rules 23 and 23.1, which concern the procedures governing class and stockholder derivative actions in the Delaware courts. (A. 7-8, A. 11) Petitioner did not advance any federal Due Process claim. For this reason, none of the opinions compiled in the Petitioner's Appendix even discuss such a claim.[2]

Not until the Delaware Court of Chancery and the Delaware Supreme Court had both rejected her state law claims did petitioner file a motion for rehearing before the Delaware Supreme Court which, for the first time, raised a "Due Process" claim. (A. 35-58) The Delaware Supreme Court denied her motion without discussion. (A. 34)

In short, petitioner's Due Process claim is an after-the-fact argument which petitioner never seriously advanced in the state courts below. The Delaware courts did not adjudicate that claim, or any other right, privilege or immunity set up or claimed under the United States Constitution, as required for this Court's jurisdiction pursuant to 28 U.S.C. § 1257(3).

This Court does not consider questions which were not properly presented below. *Street* v. *New York*, 394 U.S. 576, 581-82 (1969); *Bailey* v. *Anderson*, 326 U.S. 203, 206-07 (1945). As a matter of law, petitioner's failure to assert her Due Process claim until a petition for rehearing does not constitute the timely and proper presentation required:

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[2] Where, as here, the "highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street* v. *New York*, 394 U.S. 576, 582 (1969).

> The settled rule is that in order to give us jurisdiction to review the judgment of a state court upon writ of error the essential federal question must have been especially set up there at the proper time and in the proper manner, and, further, *that if first presented in a petition for rehearing, it comes too late* unless the court actually entertains the petition and passes upon the point.

Godchaux Co., Inc. v. *Estopinal*, 251 U.S. 179, 181 (1919) (emphasis supplied). *Accord*: *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 128 (1945) ("Questions first presented to the highest state court on a petition for rehearing come too late for consideration here, unless the State court exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised prior to the original disposition.").

Because petitioner did not properly present the claim now raised in her Petition to the state courts below, the Petition should be denied for want of jurisdiction.

2. The Adjudicated Factual Record in This Case Does Not Present the Questions Posed in the Petition.

The questions which the Petition seeks to present for this Court's review are all variations of the same argument: that respondent Valhi, without notice to PSA stockholders, allegedly prejudiced certain class action and derivative claims of those stockholders and, in return, received an exhorbitant profit by selling its PSA stock back to PSA. (Pet. i-ii) Every aspect of this argument has been adjudicated as factually erroneous. Therefore, the questions posed by the Petition do not genuinely exist in this case.[3]

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[3] Petitioner's statement of the facts is refuted not only by the findings of the Delaware courts discussed *infra*, but also by the findings of a federal court in which petitioner unsuccessfully prosecuted a related federal securities law claim against Valhi. *See Wied* v. *Shimp*, 1981-82 Fed. Sec. L. Rep. (CCH) ¶ 98,203 (S.D. Cal. 1981). *See also* A. 6, 12, 22-23.

The transaction which petitioner has challenged was a February 21, 1979 agreement whereby PSA obtained an option to redeem PSA stock owned by Valhi. To begin with, as found by the Delaware Supreme Court, the agreement in question was disclosed from the outset to all stockholders:

> There was no effort by Valhi to conceal from fellow stockholders its redemption agreement with PSA. On the contrary, the press release and information letter of transmittal to PSA stockholders of February 21, 1979, made immediately upon the execution of the agreement, constituted a complete disclosure to PSA stockholders (including Wied) of Valhi's actions and intentions, as did the prompt notification to the Trial Judge by counsel on the very next day. (A. 11-12)[4]

Despite these facts, petitioner complained to the Delaware Court of Chancery that PSA stockholders had not received formal, court-approved notice of the February 21, 1979 agreement and that no hearing concerning the redemption had been conducted. The court granted the requested hearing and issued formal notice of the hearing to all PSA stockholders:

> Notice was sent to PSA stockholders outlining the history of the case, the position of the parties, and the nature of the proposed hearing. The notice indicated that [petitioner] would raise the issue of Valhi's breach of fiduciary duty and its duty to account for any profit it realized from the exchange of its PSA stock for the Jetair stock and the lease-back arrangement with PSA. (A. 8)

This second notice and the hearing satisfied any Due Process requirements which may have existed. The Petition does not claim that there were any deficiencies in either the notice or the hearing procedures. All PSA

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[4] As found by the Delaware Supreme Court, the press release and letter to all PSA stockholders "advis[ed] the stockholders of the terms of the redemption agreement and stat[ed] that, if the transaction were consummated, Valhi would settle all of its litigation with PSA." (A. 6)

stockholders received adequate notice and a meaningful opportunity to be heard. *See Boddie* v. *Connecticut*, 401 U.S. 371, 378 (1971).[5]

Second, the Delaware Supreme Court found that Valhi did nothing in this case which prejudiced any class action or derivative claims of PSA stockholders. (A. 12)[6] The representative claims which Valhi had originally brought against PSA in the Delaware Court of Chancery were deleted from Valhi's complaint "without any prejudice to their subsequent renewal . . . and . . . those same claims were in fact subsequently reinstated and then settled by [petitioner] herself on a fair and reasonable basis." (A. 12) The Petition does not articulate any prejudice to the stockholders' claims, nor any other reason to reject this finding of the court below.[7]

Third, Valhi did nothing in this case which prejudiced any economic interest of PSA or its stockholders. To the contrary, on the basis of the factual record developed at the hearing conducted by the Delaware Court of Chancery, that court concluded that the redemption challenged by petitioner was "entirely fair" to PSA and all its stockholders. (A. 20-23) In particular, the Delaware Court of Chancery found as fact that Valhi received no profit in the redemption. (A. 20-21, A. 23) The Petition does not demonstrate that these findings are incorrect.

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[5] In addition to this notice of the hearing conducted on the redemption, PSA stockholders also received another court-approved notice on the settlement of the class action and derivative claims. (See A. 8)

[6] As the Delaware Supreme Court observed, the fact that Valhi did not prejudice any representative claims clearly distinguishes this case from those upon which petitioner relies. (A. 12-13)

[7] Nothing in the record supports petitioner's claim that the Delaware courts abandoned their "monitoring responsibility" or ignored Valhi's original representative status and "transformed this case into an individual action." To the contrary, both courts applied fiduciary standards to the facts of Valhi's conduct as determined after a full evidentiary hearing (A. 9-14), and the Delaware Supreme Court's opinion was carefully limited to those facts (A. 13).

The cause of action which petitioner pursued in the Delaware courts was found factually baseless, as well as legally deficient. The Delaware courts rejected the version of the "facts" which petitioner now merely assumes in her "Statement of the Case" and "Questions Presented." The legal questions posed in the Petition simply do not exist on the fully adjudicated record of this case.

CONCLUSION

In the courts below, petitioner prosecuted an action against a stock redemption based on a claimed failure to comply with certain procedural rules of the Delaware court system. She lost. The redemption was found fair in every respect. No one was ever prejudiced in any way. Petitioner's current effort to construct a federal "Due Process" claim for presentation to this Court lacks any basis in fact, and the claim was never presented in a timely manner below. The Petition raises nothing worthy of the Court's review, and accordingly should be denied.

Respectfully submitted,

FRED H. BARTLIT, JR.
JEFFREY S. DAVIDSON *
NANCY E. HOLLINGSWORTH
KIRKLAND & ELLIS
1776 K Street, N.W.
Washington, D.C. 20006
(202) 857-5000

A. GILCHRIST SPARKS, III
MORRIS, NICHOLS, ARSHT & TUNNEL
12th and Market Streets
Post Office Box 1347
Wilmington, DE 19899
(302) 658-9200

Attorneys for Respondent Valhi, Inc.

* Counsel of Record

Date: January 19, 1984